

We are with respect unable to agree with the appellants' contention. This contention of the appellants was canvassed and strenuously argued by them before the learned judge who, speaking of essential posts had this to say in his grounds of judgment —

"According to the definition, employees holding Essential Posts are those who are required to be present at all times at their place of work (or determined place of work) on call. As I understand the definition, they have to be present at their place of work at all times on call even though they may not be actually doing their work at the times. So firemen were required to be present at their place of work while on call although they are not actually performing their firefighting work but other firemen may be performing firefighting at the time. So also a lighthouse man is required to be present at the lighthouse all the time on call. In the evidence of these two plaintiffs there is nothing to show that they were required to be present at their place of work while on call. Although they were on call while they were not actually performing their functions, they were not required to be present at their place of work while on call.

When the plaintiffs were considered for appointment to their posts, they were given letters of offer in which certain conditions of appointment were stated, one of which was the following:—

"That you may be required to live in Port Authority quarters if these are allotted to you."

It is therefore clear that the defendants may provide the plaintiffs with quarters or may not do so under the contract of employment. The form of the letter of offer is contained in the Agreed Bundle of Documents at pages 1 and 2. It appears that some of the Security Officers were provided with quarters, but they should not treat this as their right, as it was merely a discretionary favour on the part of the defendants to provide them with quarters. Those who were provided with quarters were required to pay nominal rental. This is properly in accordance with the Service Circular."

We agree with the finding of the learned judge and we only have this to say; that having regard to the meaning given to the words "essential post", we do not think they could apply to the appellants — who were not in fact required to be present on call *at all times at their place of work* (emphasis is ours). They may be called upon to render duties but this does not necessarily mean that they were required to be present on call at all times at their place of work unlike those posts referred to and distinguished by the learned judge.

In our judgment the appellants were not as of right entitled under the Circular to this item of their claim and we accordingly dismiss it. We only allow the claim for dark allowance as from the date of option and costs.

Order accordingly.

Solicitors: *G.T. Rajan & Co.; Tunku Zuhri, Manan & Abdullah.*

A S.E.A. HOUSING CORPORATION SDN. BHD. v. LEE POH CHOO

[F.C. (Suffian L.P., Syed Othman & Abdul Hamid F.J.)
February 4 & March 19, 1982]

[Kuala Lumpur — Federal Court Civil Appeal No. 67 of 1981]

Housing Developers — Breach of statutory rules — Effect of — Housing Developers (Control and Licensing) Rules, 1970, rr. 12 & 13 — Housing Developers (Control and Licensing) Act, 1966, s. 24.

Contract — Building Contract — Building not completed within eighteen months after date of contract — Exemption clause — Breach of statutory rules — Damages — Set-off — Housing Developers (Control and Licensing) Rules, 1970, rr. 12 & 13 — Housing Developers (Control and Licensing) Act, 1966, s. 24.

In this case the respondent had sued the appellants for damages for breach of contract and for delivery of documents of title relating to land and house in Petaling Jaya. The respondent had agreed to purchase the property from the appellants and it was a term of the agreement that the building on the said property should be completed within a period of eighteen months from the date of the agreement. The building was only completed some twenty three months after that date. The appellants claimed that they were protected by clause 32 in the agreement which exempted the appellant if the non-fulfilment of any terms and conditions of the agreement was caused by circumstances beyond their control. The issues in dispute between the parties at the trial were as follows:—

1. Do the Housing Developers (Control and Licensing) Act 1966 and 1970 Rules apply to this case. If they do, can the defendants contract out of the Act and the Rules?
2. What is the position of the defendants under the Common Law?
3. Can the plaintiff set off the last payment of the purchase price against liquidated damages?
4. Was the plaintiff in breach for non-payment of the last instalment of the purchase price?
5. Is the plaintiff entitled to special damages at \$2,400 per month being rental?

F The learned Judicial Commissioner ([1982] 1 M.L.J. 324) held (1) the Housing Developers (Control and Licensing) Rules, 1970, apply in this case and the defendant was in breach of the statutory provision of the rules; (2) the Housing Developers (Control and Licensing) Act, 1966 and the Rules were introduced for the public to regulate and control the business of housing developers and must be strictly followed; (3) the defendants could not contract out of the statutory provisions of the 1970 Rules; (4) the defendants have failed to prove that the delay in this case was due to circumstances beyond their control and therefore the plaintiff was entitled to damages as provided in the contract; (5) the plaintiff has a right to set-off the last payment of the purchase price against the liquidated damages; (6) the failure of the plaintiff to pay the balance of the purchase price did not amount to a repudiation of the contract; (7) the plaintiff had failed to prove her loss of use and occupation of the building by way of rental.

G The appellant appealed and the three issues which arose in the appeal were —

1. Is clause 32 of the agreement valid?
2. If so, was the Judicial Commissioner right in holding that the acute shortage of cement etc. did not come within clause 32 such that the defendant is not liable for the delay? and
3. Did the respondent in withholding the payment of the last instalment due commit breach of the agreement?

I The respondents cross-appealed against the dismissal of her claim for loss of rent.

Held: (1) it is clear that only terms and conditions designed to comply with the requirements of the Housing Developers (Control and Licensing) Rules, 1970, may be inserted in the contract of sale of land that is governed by the Housing Developers (Control and Licensing) Act, 1966 and the Rules, and that the contrary terms and conditions which purport to

get round the Act and rules so as to remove the protection of home buyers may not be so inserted;

(2) Clause 32 of the agreement being inconsistent with Rule 12 of the Rules and not designed to comply with the requirements of the rules is void;

(3) it was open to the developer to try and persuade the Controller of Housing to modify the rigours of paragraph (o) and (r) of rule 12(1) but in the absence of waiver or modification by the Controller, Clause 32 is void and therefore the developer is liable in damages for the delay in completion;

(4) the respondent in this case did not breach the agreement when she withheld payment of the amount demanded by the appellant. The respondent's cross-claim and the appellant's claim arose out of the same transaction and are closely connected with each other. The respondent's cross-claim was so closely connected with the appellant's demand that it would be manifestly unjust to allow the appellant to enforce payment without taking into account the respondent's cross-claim;

(5) the learned Judicial Commissioner was right in dismissing the respondent's claim for loss of rent as there was insufficient evidence to justify the claim.

Cases referred to:-

- (1) *Johnson & Anor. v. Moreton* [1978] 3 All E.R. 37.
- (2) *Daiman Development Sdn. Bhd. v. Mathew Lui Chin Teck & Anor.* [1978] 2 M.L.J. 239.
- (3) *Hanak v. Green* [1958] 2 Q.B. 9.
- (4) *Shanghai Hall Ltd. v. Town House Hotel Ltd.* [1967] 1 M.L.J. 223, 227.
- (5) *Gilbert Ash (Northern) Ltd. v. Modern Engineering (Bristol) Ltd.* [1973] 3 All E.R. 195.
- (6) *Alliance (Malaya) Engineering v. San Development* [1974] 2 M.L.J. 94.
- (7) *Bonham-Carter v. Hyde Park Hotel* [1948] 64 T.L.R. 177, 178.
- (8) *Sum Kum v. Devaki Nair & Anor.* [1964] M.L.J. 74.
- (9) *Daiman Development Sdn. Bhd. v. Mathew Lui Chin Teck & Anor.* [1981] 1 M.L.J. 56.
- (10) *Federal Commerce Ltd. v. Molena Alpha Inc.* [1978] 3 W.L.R. 309.
- (11) *Modern Engineering (Bristol) Ltd. v. Gilbert Ash (Northern) Ltd.* [1974] A.C. 689.
- (12) *Dawnays Ltd. v. F.G. Minter Ltd.* [1971] 2 All E.R. 1389.

[The following cases were also cited in the Federal Court:— *Mary-Ann Arrichiello v. Tanglin Studio Pte. Ltd.* [1981] 2 M.L.J. 60; *Woodar Investment Development Ltd. v. Wimpey Construction U.K. Ltd.* [1980] 1 All E.R. 571; *Lyle v. Chappell* [1932] 1 K.B. 691.]

FEDERAL COURT.

R.R. Chelliah (D. *Lingam* with him) for the appellant.

R.R. Sethu for the respondent.

Cur. Adv. Vult.

Suffian L.P. (delivering the judgment of the Court): The plaintiff (respondent before us) wanted to buy a shophouse on lot 25602 1,680 sq. ft. in area in phase 5 in SEA Park, Petaling Jaya, from the defendant who is a licensed developer (appellant before us).

It is common ground that the transaction between the two is governed by the Housing Developers (Control) and Licensing Act 1966 ("the Act") and the Housing Developers (Control and Licensing) Rules 1970 ("the rules") published as P.U.(A) 268/70.

On January 2, 1974 by a written agreement (AB1) the plaintiff agreed to buy from the defendant the shophouse at the price of \$175,000. Under the agreement the defendant was to complete the said building

within 18 months from the date of the agreement, i.e. on or before July 1, 1975. The plaintiff paid a deposit and paid the rest of the purchase price progressively. In fact the building was not completed until June 16, 1977. It is a term of the said agreement that the defendant should pay liquidated damages at the rate of 8% per annum on the purchase price for any delay in the completion of the said building up to the date of actual completion and delivery of possession.

The following events then happened. By a letter dated June 16, 1977 (AB23) the defendant wrote to the plaintiff notifying her that the building had been completed and the Certificate of Fitness was ready for collection. The defendant asked the plaintiff to pay \$17,907.20 made up as follows: \$17,500 being the final instalment of the purchase price and \$407.20 being quit rent for a period of 4 years.

Upon receipt of the abovementioned letter, the plaintiff replied as in AB26, pointing out to the defendant that under Clause 17 of the agreement the building was to be completed within 18 months, but the said building was completed 23 months and 15 days late. Further, the plaintiff asked whether the defendant had obtained any extension of time from the Controller of Housing and claimed that if no extension had been given by the Controller she was entitled to liquidated damages at 8% per annum on the purchase price which according to her calculation amounted to \$27,826.66, i.e. from July 2, 1975 to June 1, 1977.

The plaintiff further stated in that letter that the balance of \$17,907.20 which was payable by her was far less than the amount to which she was entitled under the agreement as liquidated damages. Therefore she suggested that the defendant should hand over the keys and pay her \$9,919.46, the difference between the two amounts.

The defendant replied on August 15, 1977 (exhibit AB28) asking the plaintiff to call at its office to discuss the matter.

In the meantime, on August 13, 1977 the plaintiff's solicitors had written to the defendant AB27, claiming that their client was entitled to set off against the balance of the purchase price the liquidated damages due to the plaintiff under the agreement and asking the defendant to hand over the key and pay the plaintiff \$9,919.46.

Subsequently, the defendant instructed its solicitors who by a letter dated September 23, 1977 (AB34) stated *inter alia* as follows:—

"2. Our client instructs us that the payment of the balance of the purchase price to our client and the delivery of the keys and premises by our client, and your client's claim for damages for alleged delay are two entirely separate issues. We are instructed to give you notice, which we hereby do, that if your client wishes to obtain delivery of the keys to the premises, she must immediately pay all outstanding sums to our client. If she does not do so, she will be held fully responsible for any delay in the delivery of the keys to her.

3. With respect to the entirely separate issue of your client's claim for damages for alleged delay in the completion of the three-storey shophouse, our instructions are as follows.

4. Our client instructs us that it denies any liability to pay any damages for the delay in completion alleged by your

client. We are instructed to draw your client's attention to the provisions in the Sale and Purchase Agreement including clause 32. Our client instructs us that the alleged delay in the delivery of vacant possession, if any (which is hereby denied), was caused by circumstances beyond the control of our client. Apart from the acute shortage of contractors, sub-contractors, skilled and semi-skilled labour and construction workers during part of the relevant stage of the construction, there was also at the relevant time a general shortage of building materials particularly cement. We are instructed that the acute shortage of contractors etc. referred to above was the result of unforeseen simultaneous commencement and development of several large housing estates in the neighbourhood of our client's development. This large-scale development in the neighbourhood increased the mobility of contractors etc. under the pressure of supply and demand and also created a shortage in absolute terms. With regard to the shortage of building materials, we are instructed that our client was compelled to import cement from overseas sources with the approval of the relevant authorities.

5. Our client instructs us that the schedule in clause 3 of the Agreement was adopted from the schedule given under the Developers Rules, which was ascertained subsequently to be generally applicable to the sale of link or terrace houses and strictly speaking was not intended for the sale of three-storey shophouses which by the nature of their structure should reflect the different stages of the construction of a three-storey shophouse. Despite the adoption of a schedule payment disadvantageous to our client, although our client could have applied to the Controller of Housing for a new schedule at the time of the drafting of the Sale Agreement, our client adhered to the original schedule.

6. In view of what is stated above our client instructs us that your client has no valid grounds to claim for damages for the alleged delay and our client denies any liability therefor."

On September 30, 1977, the plaintiff's solicitors replied (AB36) as follows:—

"The issues are not separate. By reason of the delay in completion, our client is entitled to damages and what our client is saying is that she sets off the damages for delay against the sum due to your client and demand the payment of the balance of the damages. Both arise out of the same matter. The reasons you have advanced cannot be a ground to deny our client's claim for damages for delay.

Our client quite justifiably, has instructed us not to waste time with you and your clients on this by further correspondence. Accordingly our client will issue a writ of Summons against your clients. Do you have instructions to accept service."

On October 10, 1977, the plaintiff issued a writ against the defendant. In her statement of claim she said that the agreement is subject to the Housing Development (Control and Licensing) Rules 1970. This is admitted by the defendant in paragraph 3 of the defence which further avers that the common law and other statute law also apply. The defendant also admits that under the agreement it was required to complete the said building within a period of 18 months from the date of the agreement, that the plaintiff has paid 90% of the purchase price and that the defendant should pay the plaintiff liquidated damages at 8% per annum on the purchase price for any delay in completion of the said building. However, the defendant claims that it is protected by clause 32 of the agreement which exempted the defendant from liability for non-fulfilment of any terms and conditions of the agreement if such non-fulfilment was caused by circumstances beyond the defendant's control.

The plaintiff claimed

- (a) the sum of \$9,919.46;
- (b) loss of rent at \$2,400 per month from June 16,

- A 1977 when the shophouse should have been completed until delivery of possession;
- (c) delivery of possession of the shophouse and its keys;
- (d) delivery of the issue document of title and various other reliefs.

B In the event the learned Judicial Commissioner dismissed claim (b) but allowed all other claims.

The developer appealed from that part of the judgment allowing claims under heads (a), (c) and (d), while the plaintiff cross-appealed against that part dismissing her claim under head (b).

C Three issues arise before us in the appeal:

- (1) Is clause 32 of the agreement valid?
- (2) If so, was the learned Judicial Commissioner right in holding that the acute shortage of cement, etc. did not come within clause 32 such that the defendant is not liable for the delay? and
- (3) Did the plaintiff in withholding payment of the last instalment due commit breach of the Agreement?

As to the rules which govern the transaction between the parties, rule 12 is relevant. That rule provides that every contract of sale — such as the one here — shall be in writing and shall contain within its terms and conditions provisions to the effect set out in the various paragraphs of that rule. Paragraph (c) is relevant; that says that the agreement must specify:

"the date of delivery of the vacant possession of the housing accommodation to the purchaser which date shall not be later than 18 months after the signing of the contract of sale."

F That, as we have seen, was done. Then there is paragraph (r) which provides that the agreement must contain:

"provisions binding on the licensed housing developer that he shall indemnify the purchaser for any delay in the delivery of the vacant possession of the housing accommodation. The amount of indemnity shall be calculated from day to day at the rate of not less than eight per cent per annum of the purchase price commencing immediately after the date of delivery of vacant possession as specified in the contract of sale."

That too was done, as we have seen.

But then the developer says, as we have seen, that it is excused from liability by clause 32 of the agreement which reads:

H "The vendor shall not be liable to purchaser for any failure to fulfil any terms of this Agreement if such fulfilment is delayed, hindered or prevented by force majeure including but not limited to acts of God strikes lockouts riots civil commotion acts of war or the disability of contractors and sub-contractors employed by the vendor either commencing, carrying on or completing their work or failure to obtain any necessary sanction or approval of any local authority or any other circumstances of whatsoever nature beyond the control of the vendor."

I It is said here that owing to the then building boom and resultant shortage of building materials and labour which was beyond the control of the developer it is not liable because of this clause 32.

With great respect to Mr. Chelliah for the developer we do not agree that it is open to the developer to escape liability by inserting clause 32 in the agree-

ment. It is common knowledge that in recent years, especially when government started giving housing loans making it possible for public servants to borrow money at 4% interest per annum to buy homes, there was an upsurge in demand for housing, and that to protect home buyers, most of whom are people of modest means, from rich and powerful developers, Parliament found it necessary to regulate the sale of houses and protect buyers by enacting the Act. That was why rule 12 was enacted and in particular paragraphs (o) and (r) thereof. With respect we do not agree with Mr. Chelliah that it was open to a developer to get round these paragraphs by the inclusion of such a clause as clause 32 in this agreement.

In *Daiman Development Sdn. Bhd. v. Mathew Lui Chin Teck*⁽²⁾ we said at page 243 that developers are bound by the rules and if an agreement of sale is subject to contract,

"only details may be inserted into the further agreement."

Mr. Chelliah argued that clause 32 is such a detail. With respect we do not agree. In our judgment such details as are inserted into a written agreement must be details consistent, not inconsistent with the Act and rules. Clause 32 is inconsistent with paragraph (r) of rule 12(1).

When *Daiman* went to the Privy Council⁽⁹⁾ their Lordships observed at page 60, second column:

"...it seems to their Lordships that upon the proper construction of the proforma [used in that case] the solicitors [for the developer there] would not be able to include in the contract of sale any term or condition which was not appropriate to effectuate the sale which had been made, including for that purpose, of course, provisions to comply with the requirements of the rules."

Thus it is clear that only terms and conditions designed to comply with the requirements of the rules that may be inserted in a contract of sale of land that is governed by the Act and rules, and that on the contrary terms and conditions which purport to get round the Act and rules so as to remove the protection of home buyers may not be so inserted.

With respect, the provisions in question here are similar to those in *Johnson v. Moreton*,⁽¹⁾ a House of Lords decision, where at page 49 Lord Hailsham said:

"The policy of the law has been repeatedly used to protect the weaker of two parties who do not contract from bargaining positions of equal strength. (line a).

The truth is that it can no longer be treated as axiomatic that, in the absence of explicit language, the courts will permit contracting out of the provisions of an Act of Parliament — as was attempted here — where that Act, though silent as to the possibility of contracting out, nevertheless is manifestly passed for the protection of a class of persons who do not negotiate from a position of equal strength, but in whose well-being there is a public as well as a private interest." (line d onwards).

It would appear that only "contracting out" in favour of the weaker party — i.e. the purchaser — might be countenanced by the courts.

The construction we place on the rules is not as harsh as it seems to a developer — for he has a safeguard in subrule (2) of rule 12 which provides:

"Notwithstanding the provisions of paragraph (1) of this Rule, where the Controller [of Housing] is satisfied that owing to

A special circumstances the compliance with any provisions of this Rule is impracticable or unnecessary he may by a certificate in writing waive or modify such provisions in respect of any contract of sale."

B Thus in the circumstances of this case it would have been open to the developer to try and persuade the Controller to modify the rigours of paragraphs (o) and (r) of rule 12(1). If it had succeeded it would have escaped liability. But it made no attempt to do so.

C But Mr. Chelliah says that under the terms of rule 12(2) the developer could have done so only before a contract of sale had been finalized and not after. With respect we do not agree; in our judgment it is open to a developer to take advantage of this provision after as well as before such a contract has been finalized.

D For the reasons given above, we are of the opinion that clause 32, being inconsistent with rule 12 and not designed to comply with the requirements of the rules and in the absence of waiver or modification by the Controller of Housing under rule 12(2), is void, and that therefore the developer is liable in damages for the delay in completion.

In view of our conclusion on the first issue, there is no need for us to consider the second issue.

E As regards the third issue we are of the opinion that the plaintiff did not breach the agreement when she withheld payment of the money demanded by the defendant.

As was stated by Lord Denning M.R. at pages 337-8 in *Federal Commerce Ltd. v. Molena Alpha Inc.*⁽¹⁰⁾:

F "It is often necessary to distinguish between a set off or defence properly so called; and a counterclaim or cross-action..."

...take the case where a contract gives a creditor a right to take the law into his own hands — to take a particular course of action if a sum is not paid — such as to forfeit a lease for non-payment of rent, or to withdraw a vessel for non-payment of hire. There the distinction between set-off and cross-claim is crucial. When the debtor has a true set off it goes in reduction of the sums owing to the creditor. If the creditor does not allow it to be deducted, he is in peril. He will be liable in damages if he exercises his contractual right of withdrawal wrongly. But when the debtor has no set off or defence properly so called, but only a counterclaim or cross-action, then the creditor need not allow any deduction to be made. He can exercise his contractual right without fear; and leave the debtor to bring an action for damages on his counterclaim.

H "...But one thing is quite clear; it is not every cross-claim which can be deducted. It is only cross-claims that arise out of the same transaction or are closely connected with it. And it is only cross-claims which go directly to impeach the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim."

I The plaintiff's cross-claim and the defendant's claim arise out of the same transaction and are closely connected with each other. The plaintiff's cross-claim is so closely connected with the defendant's demand that it would be manifestly unjust to allow the defendant to enforce payment without taking into account the plaintiff's cross-claim.

The decision of the House of Lords in *Modern Engineering (Bristol) Ltd. v. Gilbert Ash (Northern) Ltd.*⁽¹¹⁾ substantiates the position taken by the plain-

tiff in this matter, and the House in that case disapproved *Dawnays Ltd. v. F.G. Minter Ltd.*,⁽¹²⁾ in any event *Dawnays* was decided on the basis that it was not permissible to deduct claims which were unliquidated and still in dispute, which is not the case here. The damages claimed by the plaintiff for the delay were capable of quantification under the terms of the agreement in accordance with the provisions of rule 12(1)(r) of the Rules and cannot be in dispute if clause 32 of the agreement is of no effect.

For the above reasons we would dismiss the defendant's appeal.

As regards the plaintiff's cross-appeal from the decision of the learned Judicial Commissioner dismissing her claim under head (b) i.e. her claim for loss of rent which she would have received for the shophouse had it been completed within the time stipulated in the agreement, in our judgment the learned Commissioner was right, and we would accordingly dismiss the cross-appeal. We agree with him that there was insufficient evidence to justify the plaintiff's claim.

Before us, Mr. Sethu argued that there was no need at the stage of the trial for him to bring sufficient evidence, as he had asked during the course of his submission in the High Court that if there was a basis for his claim the matter of damages be referred to the Registrar for evidence and determination. We do not think it necessary to consider this argument, because in our judgment paragraph (r) of rule 12(1) covers this head of claim. The paragraph specifically deals with the indemnity to be paid to the purchaser "for any delay in the delivery of the vacant possession of the housing accommodation ... the amount of indemnity ... to be calculated from day to day at the rate of not less than eight per cent per annum of the purchase price commencing immediately after the date of delivery of vacant possession as specified in the contract of sale." In our judgment, this is intended to be comprehensive — and precludes the purchaser from recovering under any other head damages in the event of delay in delivery as happened here.

To sum up — we dismiss the defendant's appeal with costs.

We also dismiss the plaintiff's cross-appeal with costs.

*Appeal dismissed;
Cross-appeal dismissed.*

Solicitors: Mohamed Akhbar & Partners; Azman Davidson & Co.

A HO SHEE CHIT & ANOR. v. BRUUSGAARD KISTERUDS SKIBSAKSJESELSKAP & ANOR.

[F.C. (Suffian L.P., Salleh Abas & Abdul Hamid FJJ.)
March 2 & 26, 1982]

[Kuala Lumpur — Federal Court Civil Appeal No. 60 of 1978]

Practice and procedure — Appeal — No grounds of judgment of trial court — Notes of counsel — Whether admissible — Rules of the Federal Court, 1980, rr. 62(4) & 68.

In this case there was a dispute between the two plaintiffs (respondents) and the two defendants (appellants) and the learned trial judge gave oral judgment against the defendants. The defendants appealed but the grounds of judgment of the learned trial judge were not available. Counsel for the plaintiff in the High Court made notes of what the learned judge said and application was made for the affidavit of counsel containing the notes to be received by the court.

Held: in the circumstances of the case, the affidavit of counsel would be received, but first it should be shown to counsel who appeared for the other side at the trial to give him an opportunity to comment and then it, together with the comment, if any, should be submitted to the learned judge for his comment. The affidavit of counsel containing his note, the comment of counsel on the other side and the learned judge's comment, if any, should then be made available for the use of the appeal court.

Cases referred to:-

- (1) *Tan Kim Leng v. Chong Boon Eng* [1974] 2 M.L.J. 151.
- (2) *Earl De La Warr v. Miles* 44 L.T. 487.
- (3) *Thompson v. Andrews* [1968] 1 W.L.R. 777.
- (4) *Pitman v. Southern Electricity Board* [1978] 3 All E.R. 901.
- (5) *Malins v. Price* 41 E.R. 757.
- (6) *Cattell v. Corral* 160 E.R. 763.
- (7) *Sims v. Wilson* [1946] 2 All E.R. 261.
- (8) *Hayman v. Rowlands* [1957] 1 All E.R. 321.
- (9) *Bruen v. Bruce* [1959] 2 All E.R. 375.

[The following case was also cited in argument:— *In re Mc Connell* (1885) 29 Ch. D. 76.]

FEDERAL COURT.

V.K. Palasuntharam (S. Kulasegaran with him) for the appellant.

V.P. Pradhan for the respondent.

Cur. Adv. Vult.

Suffian L.P. (delivering the judgment of the Court): There was a dispute between the two plaintiffs (respondents before us) and the two defendants (appellants), the matter came before the court and on April 21, 1978, the learned trial judge gave oral judgment against the defendants.

The defendants appeal, but unfortunately we do not have the grounds of the learned judge's judgment.

Mr. Peddie who was counsel for the plaintiffs in the High Court made notes of what the learned judge said prior to delivering judgment, and Mr. Pradhan for the two plaintiffs apply for the affidavit of Mr. Peddie containing those notes to be received by us. Mr. Palasuntharam for the defendants oppose the application.

So the question is whether or not we should receive Mr. Peddie's affidavit. It is agreed by Mr. Pradhan that if we do, the notes should first be submitted to the learned judge for his comment before we proceed to hear arguments on the merits of this appeal.